COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

November 18, 2008

In the Matter of

Burley Street, LLC

OADR Docket No. 2005-228
DALA Docket No. DEP-06-122
File No. 326-0248
Wenham

FINAL DECISION ON RECONSIDERATION

SUMMARY:

In a Recommended Final Decision, the Magistrate recommended vacating the Department's Superseding Order of Conditions by applying incorrectly the performance standards for bordering vegetated wetlands to the proposed construction of an access road in buffer zone. In an October 17, 2008 Final Decision, the correct standard for buffer zone was applied, and the terms of the Department's Superseding Order of Conditions were found to meet the requirements of the Wetlands Regulations. The Wenham Conservation Commission has moved for reconsideration. Reconsideration is denied. The Department's Superseding Order of Conditions should be affirmed and issued as a Final Order of Conditions.

Thomas J. Harrington, Esq. and Marguerite D. Reynolds, Esq. (Miyares and Harrington LLP), Watertown, for the petitioner.
John L. Hamilton, Esq. Hamilton, for the intervenors.
John R. Keilty, Esq., Peabody, for the applicant.
MacDara K. Fallon, Esq., Boston, for the Department of Environmental Protection.

This appeal involves a proposal by Burley Street, LLC (the "Applicant") to build ten two-unit townhouses, a roadway and associated infrastructure on 7.2 acres of wooded land in

Wenham that borders the Town of Danvers (the "Property"). On August 30, 2004, the Wenham Conservation Commission (the "Commission") issued an Order of Conditions which permitted the project, but only if access was constructed from Lester Road in Danvers. The Applicant appealed and objected to this condition on the grounds that it could only access the Property from Burley Street in Wenham.

On October 17, 2005, the Department issued a Superseding Order of Conditions ("SOC") under the authority of the Wetlands Protection Act (the "Act") and 310 CMR 10.00 et seq. (the "Wetlands Regulations") that allowed access from Burley Street on the grounds that the Applicant had demonstrated a legal impediment to access from Lester Road. The Department also required that 150 square feet of Bordering Vegetative Wetlands ("BVW") filling would require replication of BVW under the standards of 310 CMR 10.55(4) in Area 1 of the Property where the roadway for the project would have to cross wetlands. There is no dispute that this 150 square foot of fill was unavoidable whether access was constructed from Lester Road or from Burley Street. The part of the work in controversy was the proposed construction of the access road from Burley Street in Area 2 of the property in close proximity to BVW for much of its length. Because the Department found that BVW impacts were likely, the Department required the Applicant to agree to mitigation measures. The Applicant did agree to mitigation measures, including limits of work, erosion controls and other measures. The Applicant also submitted a replication plan totaling 3,000 square feet of BVW with 150 square feet of replication proposed for Area 1 and 2,850 square feet of replication proposed for Area 2. Because the Department had estimated impacts from the Burley Street roadway construction and maintenance to be approximately 1,100 square feet, the Department accepted the Applicant's

proposed replication plan as being protective of the BVW interests protected by the Act. The Commission appealed this SOC, and a local residents group intervened.

In a Recommended Final Decision, the Magistrate at the Division of Administrative Law Appeals upheld the Department's finding that there was a *bona fide* legal impediment to access from Lester Road. In a Final Decision dated October 17, 2008, I concurred with the Magistrate's proposed decision on this issue. However, the Magistrate also held that the Department's SOC should be vacated because it did not meet the performance standards for work in BVW at 310 CMR 10.55(4)(b). According to the record, none of the work was proposed to be conducted within an area of BVW, and all of the work was proposed to be conducted within buffer zone. Therefore, I concluded that the Magistrate had applied the incorrect performance standard in the Wetlands Regulations to the project. Instead, I concluded that the buffer zone standards of 310 CMR 10.03(2)(b), which were the standards of the regulations in effect at the time of the Applicant's Notice of Intent, were the standards that should apply to the Burley Street access road portion of the Applicant's project.[1] This legal standard requires only that the issuing authority condition a project to protect the interests of the Act for any adjacent resource areas.

In a motion filed October 28, 2008, the Commission asks for reconsideration of the Final Decision. To succeed in a motion for reconsideration, a party must demonstrate that a decision was based upon a finding of fact or ruling of law that was clearly erroneous. *See*, 310 CMR 1.01(14)(e); Matter of Newburyport, Docket No. 2002-218, Ruling on Motion for Reconsideration 12 DEPR 50, 51 (April 29, 2005); Matter of Anthony Lawrence, Docket Nos.

[1] In 2005, after the filing of the Applicant's Notice of Intent, 310 CMR 10.53(1) was amended to provide for a longer narrative performance standard for work in buffer zone. This regulation does not apply to this project, but it is informative of the Department's view that a different standard applies to work proposed in buffer zone than to work proposed within particular wetlands resource areas.

2008-032 & 034, Recommended Final Decision (July 18, 2008), adopted by Final Decision (August 8, 2008). In addition, "[w]here a motion [for reconsideration] repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied,…it may be summarily denied." 310 CMR 1.01(14)(e). The Commission's motion, in part, merely repeats arguments that were "previously raised, considered and denied." This is true of all of the Commission's arguments with respect to my conclusion that the Applicant had no other reasonable means of access to the Property, other than the construction of an access road from Burley Street. Therefore, the Commission's motion for reconsideration as to access alternatives should be denied.

As to the work proposed in buffer zone, the Commission argues for the application of an incorrect legal standard for evaluation of the Applicant's proposed work to construct the Burley Street access road. The Commission argues that the Department should consider the work to be in BVW if the work would impact or alter such wetlands. Such an interpretation would eliminate any distinction between the performance standard for work in buffer zone and the performance standard for work in resource areas such as BVW. This would not be supportable under the clear distinction set forth in 310 CMR 10.02(b) for work proposed in buffer zone.[2] For example, although work in BVW would require one-to-one replication for alterations, such one-to-one replication is not required by 310 CMR 10.02(b) for work in buffer zone. The

[2] In addition to the case decisions cited in the Final Decision, the Department has provided additional decision citations in its opposition to the Commission's motion. *See*, Matter of Fafard Real Estate, Docket No. 95-103, 4 DEPR 78, Final Decision (June 2, 1997) (Buffer zone projects must be conditioned so as not to impair the adjacent resource area, but are not subject to the performance standards of the resource area); Matter of Farber, Docket No. 2001-106, Final Decision (August 23, 2002) ("The failure to distinguish the standard for work in resource areas from work in the buffer zone unnecessarily complicates the resolution of cases for all involved in the adjudicatory hearing."). This demonstrates the consistency that the Department has maintained on the buffer zone performance standard throughout many years of review of wetlands permits.

Department has consistently applied a distinct performance standard for work in buffer zone. I will clarify that pre-construction review of most projects in buffer zone is required pursuant to 310 CMR 10.02(2)(b)(3), and such review is important to protect the interests of the Act for adjacent resource areas. However, the protection of such resource areas does not require an application of the performance standards for each such resource area to work in buffer zone.[3]

The Commission also argues that because the parties all agreed to apply standards for BVW to this project, that the Final Decision should uphold the Recommended Final Decision's application of those standards. Essentially, the Commission is arguing that I should apply an incorrect legal standard to this matter. I decline to do so. First, it would not be prudent for the final decision-maker in an adjudicatory appeal to apply an incorrect legal standard to any matter. The Commission cites to no legal authority that would require that I apply an erroneous legal standard to this matter. To the contrary, the regulations governing this adjudicatory appeal establish that the application of a clearly erroneous legal standard is grounds for reconsideration of a decision. *See*, 310 CMR 1.01(14)(e).

Second, I disagree with the Commission's assertion that all parties conceded to the application of the BVW performance standard. The Department's expert witness testified that all work was proposed in buffer zone, not in BVW. *See*, Prefiled Direct and Cross-Examination Testimony of Jill Provencal. In addition, while the Commission is correct that the Applicant's

[3] When the Department amended 310 CMR 10.53(1) to further clarify the performance standards for work in buffer zone in 2005, the Department did not require compliance with the performance standards for adjacent resource areas, but instead articulated a different performance standard for buffer zone. The regulatory preface to these 2005 amendments expressly discusses how the amended regulations establish "a narrative standard for work in buffer zone performed under a Notice of Intent." This explicit acknowledgement of a different standard for work in buffer zone provides an additional demonstration of the Department's consistent view that a different standard applies to buffer zone projects. The only place in the Wetlands Regulations which allows resource area standards to be applied to work in buffer zone is in 310 CMR 10.03(1)(a)(3), in which Riverfront Area standards are required to apply to work that is proposed in both Riverfront Area and buffer zone to another resource area.

expert witness testified that the project complied with the BVW performance standards, this expert always spoke to impacts to BVW as "theoretical" impacts. *See*, Prefiled Direct and Cross-Examination Testimony of William J. Manuell. Although Mr. Manuell conceded that work in buffer zone would impact the adjacent BVW, Mr. Manuell never conceded that any work would occur in BVW. *Id.* Therefore, I find that the Commission's argument is not supported by the record in this matter.

Third, to clarify the Final Decision, I did not disregard the evidence in the record as the Commission contends. I reviewed and considered all of the testimony, exhibits and evidence in the record and the Magistrate's findings. Even if I were to review the Magistrate's findings of fact in the light most favorable to the Commission, I must still conclude that the conditions imposed upon the Applicant resulted in a project that was highly protective of the interests of the Act. The Magistrate did not find, as argued by the Commission, that over 6,000 square feet of BVW would be altered by the project. She instead found only a 25 square foot, or less than 1 % discrepancy, between the total replication she thought would be required when applying the BVW performance standards and the 3,000 square feet of replication required by the Department in its SOC. When the correct buffer zone performance standard is applied, it is clear that the extensive mitigation and replication measures required by the Department's SOC would be more than adequate to protect the interests of the Act for the BVW adjacent to the proposed Burley Street access road. One-to-one replication of BVW, while required for work proposed within BVW, is not required for work in buffer zone as proposed in the Applicant's project.

For all of the foregoing reasons, the Commission's motion for reconsideration is denied.

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Laurie Burt
Commissioner

NOTICE

A person who has the right to seek judicial review may appeal this Final Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed with the Court within thirty days of receipt of this Decision.